Docket No. 89-1784

SEP 28 1990

CLERK

In the

Supreme Court of the United States

October Term, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

vs.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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PETITION FOR CERTIORARI FILED MAY 8, 1990
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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether a bankruptcy court has core jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A) over a debtor's adversary proceeding where the contract in dispute was both knowingly entered into with a debtor-in-possession after the filing of the bankruptcy petition and was mandated by the debtor-in-possession's plan of reorganization.

II. Whether a bankruptcy court has the statutory and constitutional authority to conduct a jury trial in a core proceeding.

RULE 29.1 STATEMENT

Respondent has no parent companies nor any subsidiaries which are not wholly-owned subsidiaries.

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VS.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

The respondent, Ben Cooper, Inc. ("Ben Cooper"), respectfully prays that the opinion and order of the United States Court of Appeals for the Second Circuit, entered on February 7, 1990, be affirmed.

The decision of the Second Circuit – holding that Ben Cooper's adversary proceeding seeking relief under a post-petition insurance contract is a core proceeding and that the bankruptcy court has both the statutory and constitutional authority to conduct a jury trial in a core proceeding – is well supported by judicial authority and is consistent with the fundamental goal of federal bankruptcy law to efficiently and expeditiously rehabilitate a debtor.

OPINIONS BELOW[1]

The oral opinion and order of the District Court for the Southern District of New York (Stanton, D.J.), from which the appeal to the United States Court of Appeals for the Second Circuit was taken, has not been reported. It is reprinted at J.A. 183.[2]

The oral opinion and order of the United States Bankruptcy Court for the Southern District of New York (Blackshear, B.J.) determining that the adversary proceeding is core has not been reported. The transcript of the hearing in which the ruling appears is reprinted beginning at J.A. 83. The ruling itself appears at J.A. 112-113.

COUNTER-STATEMENT OF THE CASE

Ben Cooper is a manufacturer and importer of toys and related products, specializing in halloween costumes. In April 1988, Ben Cooper filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code. During the course of the bankruptcy proceedings, Ben Cooper was required to obtain new insurance for its facilities. Ben Cooper enlisted insurance broker Kalvin-Miller International, Inc. ("K-M") who, in turn, enlisted broker Kerwick & Curran, Inc. ("KC") to procure the necessary insurance. Both K-M and KC knew that Ben Cooper was operating as a debtor-in-possession under the bankruptcy laws.

In October 1988, Ben Cooper, through K-M and KC, obtained insurance coverage for its facilities from petitioner The Insurance Company of the State of Pennsylvania ("ICPA"), which was also

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[1] The joint appendix page references in the Brief for the Petitioners for two of the opinions below are incorrect and are repeated herein pursuant to Rule 24.2 of this Court.

[2] Reference to "J.A.____" followed by a page number indicates a reference to the Joint Appendix submitted by petitioners.

fully aware that it was dealing with a debtor-in-possession. In January 1989, Ben Cooper suffered a fire loss at one of its insured facilities and, in accordance with its insurance policy, filed a claim with ICPA.

Shortly thereafter, in connection with its ongoing reorganization, Ben Cooper submitted its plan of reorganization (the "Plan") to the Bankruptcy Court (J.A. 145). Among other provisions, the Plan specifically required that Ben Cooper "keep all of its properties adequately insured with responsible insurance carriers against loss or damage by fire or other hazards." (J.A. 156-157).[3]

On April 4, 1989, the Bankruptcy Court issued its order confirming Ben Cooper's Plan (which provided for 100% payment to creditors). The Plan was confirmed on the assumption that Ben Cooper had "proper insurance" in place (J.A. 162). Two weeks later, ICPA commenced an action in New York State court seeking rescission of Ben Cooper's insurance coverage and a declaration that the insurance coverage was void from its inception.[4]

Ben Cooper then commenced its adversary proceeding in the Bankruptcy Court against ICPA, K-M and KC seeking a declaration that the insurance coverage was in effect and that it covered the loss. Ben Cooper sought payment for the loss, believed to be in excess of $2,000,000. Damages were sought, in the alternative, against K-M and KC if it were determined that the insurance coverage had not been properly obtained by them (J.A. 132).

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[3] Petitioners completely omit reference to the Plan and its express requirement for insurance, despite the fact that the Second Circuit specifically noted this requirement and relied on it in holding that the adversary proceeding was core.

[4] Petitioners incorrectly state as fact that which is at the heart of the underlying factual dispute between the parties, namely, whether the nature of Ben Cooper's operations (specifically with respect to the facility which suffered the fire loss) was disclosed to ICPA. Ben Cooper contends that ICPA was fully aware that its insured facilities included manufacturing operations. ICPA contends that it was not.

On Ben Cooper's motion, the Bankruptcy Court enjoined the prosecution of the action ICPA had commenced in state court (J.A. 37). After this initial ruling, petitioners (together with K-M) moved in the United States District Court for withdrawal of the reference to the Bankruptcy Court. The District Court (Walker, D.J.) ruled that the motion was premature and remanded the matter to the Bankruptcy Court for a core/noncore determination pursuant to 28 U.S.C. § 157(b)(3) (J.A. 68). The Bankruptcy Court then ruled that the adversary proceeding was a core proceeding under at least two provisions of 28 U.S.C. § 157(b)(2) – subsection (A), "matters concerning the administration of the estate", and subsection (L), relating to "confirmation of plans" (J.A. 87).

Petitioners then moved the District Court seeking reversal of the core determination, establishment of its right to a jury trial, dissolution of the injunction and withdrawal of the reference. In a decision read in open court, the District Court (Stanton, D.J.) reversed the Bankruptcy Court's determination that the proceeding was core, ruled that petitioners were entitled to a jury trial on some of the issues raised, vacated the injunction and withdrew the reference (J.A. 183).

Ben Cooper appealed the District Court's decision to the United States Court of Appeals for the Second Circuit. The Second Circuit reversed the District Court and held that the proceeding was core, agreed that petitioners were entitled to a jury trial and ruled that the Bankruptcy Court was both statutorily and constitutionally empowered to conduct the jury trial. *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990). The Second Circuit remanded the proceeding to the Bankruptcy Court.

Petitioners[5] filed a petition for certiorari, which was granted June 28, 1990.

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[5] K-M did not join in the petition and is not a party to this appeal.

SUMMARY OF ARGUMENT

I. The Second Circuit held that the adversary proceeding commenced by Ben Cooper, based on a post-petition contract knowingly entered into with the debtor-in-possession, is a core proceeding. The holding is consistent with this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ("*Marathon*") and with the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA") – which was Congress' response to *Marathon*.

When this Court, in *Marathon*, invalidated the then existing statutory scheme, it found that the Bankruptcy Reform Act of 1978 had impermissibly granted the essential attributes of the judicial power to a non-Article III Court. To remedy this defect, Congress enacted BAFJA, which distinguished between "core" proceedings, which non-Article III courts could "hear and determine", and "noncore" or "related" proceedings, the ultimate determination of which was reserved to the Article III district courts.

The legislative history of BAFJA indicates that Congress intended that the bankruptcy court's "core" jurisdiction be pressed to its constitutional limits. Thus, the Second Circuit held that this adversary proceeding was core under 28 U.S.C. § 157(b)(2)(A) – matters concerning the administration of the estate – because, *inter alia*, the insurance coverage in dispute was a requirement of the debtor's plan of reorganization, and the petitioners knowingly contracted with a debtor-in-possession.

The Second Circuit found that the timing of the dispute – arising from a post-petition contract – differentiated this case from *Marathon* and made this proceeding intrinsic to estate administration.

This decision (and the BAFJA statutory scheme) satisfies the constitutional mandate of *Marathon*, as the adjudication of traditional state law claims which are only peripherally related to bankruptcy will remain in Article III courts while claims at the "core" of bankruptcy will be reserved for the bankruptcy courts.

II. The Second Circuit also held that a bankruptcy court may conduct a jury trial. This conclusion, which this Court discussed but did not decide in *Granfinanciera, S.A. v. Nordberg*, ____U.S.____, 109 S.Ct. 2782 (1989) (*"Granfinanciera"*), is well supported by statutory and constitutional authority, as well as by policy considerations.

In light of *Granfinanciera*, the only consistent reading of the statutory scheme requires that bankruptcy courts be permitted to conduct jury trials. To eliminate this authority would do violence to the statutory scheme pursuant to which the bankruptcy court was empowered to "hear and determine" core proceedings. This conclusion finds support in the current statutory provisions, as well as in the legislative history.

With respect to constitutional authority, it is clear that neither the Seventh Amendment nor Article III would preclude the conduct of a jury trial in bankruptcy court. Seventh Amendment jury trials have been sanctioned in non-Article III courts and *Marathon* did not prohibit jury trials in the bankruptcy courts.

Finally, jury trials in bankruptcy courts are supported by policy concerns. It is well-settled that all bankruptcy matters should be handled within the context of one proceeding. Removing discrete parts of a bankruptcy proceeding from the bankruptcy courts because of the necessity of a jury trial would hamper the efficient operation of the bankruptcy system and would further overcrowd the district courts.

I

THE BANKRUPTCY COURT HAS CORE JURISDICTION PURSUANT TO 28 U.S.C. § 157(b)(2)(A) OVER THE ADVERSARY PROCEEDING AS THE CONTRACT IN DISPUTE WAS BOTH KNOWINGLY ENTERED INTO WITH A DEBTOR-IN-POSSESSION AFTER THE FILING OF THE BANKRUPTCY PETITION AND WAS MANDATED BY THE DEBTOR-IN-POSSESSION'S PLAN OF REORGANIZATION

A. *Introduction*

The Second Circuit's decision that Ben Cooper's adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A) is a holding consistent with a long line of cases interpreting this Court's landmark decision in *Marathon*, as well as with the statutory scheme mandated by *Marathon*. That the bankruptcy court, in overseeing the administration of the bankruptcy estate, should exercise its "core" jurisdiction over an adversary proceeding involving a post-petition contract, comports with this Court's concerns, as expressed in *Marathon*, as well as with the purposes of Congress in enacting BAFJA in response to such concerns.

B. *Marathon*

The distinction between core and noncore proceedings contained in 28 U.S.C. § 157 – which underlies the first of the two issues involved in this appeal – is a direct result of this Court's decision in *Marathon*. The issue in *Marathon* was the constitutionality of former § 1471 of the Bankruptcy Act of 1978, specifically, whether Congress' jurisdictional grant to bankruptcy courts contained in that section violated Article III of the Constitution.

The underlying dispute in *Marathon* involved a suit brought by the debtor subsequent to the filing of its petition for reorganization to recover damages for, *inter alia*, alleged

breaches of contract and of warranty. Importantly, the breaches alleged to have been committed had occurred *prior* to the filing of the bankruptcy petition. 458 U.S. at 84.

Appellants argued that Congress' grant of jurisidiction in § 1471 violated Article III because it impermissibly vested in non-Article III bankruptcy judges the "judicial power" reserved to judges with the protections contained in Article III, that is, life tenure and irreducible compensation. The Court, in a plurality opinion, agreed that the bankruptcy court, as then constituted, could not hear and determine the state law claims involved in *Marathon*.

The plurality concluded that § 1471 had "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court and ha[d] vested those attributes in a non-Art. III adjunct." 458 U.S. at 86-87. As such, the jurisdictional grant could not be sustained.

The actual holding of *Marathon*, however, is limited by the fact that only four justices joined in the lead opinion. Then Associate Justice Rehnquist concurred in the opinion in a limited manner, thus constituting the decision of the Court. As summarized by former Chief Justice Burger's dissent:

> the Court's holding is limited to the proposition stated by Justice REHNQUIST in his concurrence in the judgment – that a *"traditional"* state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Art. III court" if it is to be heard by any court or agency of the United States.

Id., 458 U.S. at 92 (Burger, C.J., dissenting; emphasis added).

The limited nature of this holding has twice been reaffirmed by the Court. In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court stated:

> The Court's holding in [*Marathon*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a *traditional* contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

Id., 473 U.S. at 584 (emphasis added). This view was repeated by the Court the following year in *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 839-840 (1986).

This limited holding, together with the resulting statutory scheme, provides the rationale for the Second Circuit's decision that the adversary proceeding herein is core.

C. *The Broad Jurisdictional Scheme of the Bankruptcy Amendments and Federal Judgeship Act*

Congress' response to the Court's mandate in *Marathon* was the enactment of a new jurisdictional statute, BAFJA. To meet the dictates of *Marathon*, Congress established the bankruptcy judges in each judicial district as a unit of the district court, known as the bankruptcy court of that district. 28 U.S.C. § 151. The bankruptcy judge was denominated "a judicial officer of the district court" and was given "the authority conferred under this chapter with respect to any action, suit or proceeding. . . ." *Id.*

The procedures for determining what matters would be referred to the bankruptcy courts were contained in 28 U.S.C. § 157. The district court was empowered to refer to bankruptcy judges "all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . ." 28 U.S.C. § 157(a). In accordance with § 157(b), "Bankruptcy judges may *hear and determine* all cases under title 11 and *all core proceedings arising under title 11*, or *arising in a case under title 11* . . . . and may enter appropriate orders

and judgments subject to review under section 158." 28 U.S.C. § 157(b)(1) (emphasis added).

The following subsection includes a non-exclusive list of fifteen types of "core proceedings", of which the first – "matters concerning the administration of the estate" – is relevant to this appeal.[6] *See* 28 U.S.C. § 157(b)(2)(A). With respect to proceedings that were not core proceedings but were "otherwise related to a case under title 11", the bankruptcy judge was empowered to submit proposed findings of fact and conclusions of law to the district court, subject to the district court's *de novo* review. 28 U.S.C. § 157(c)(1).

Thus did Congress preserve the constitutional distinction contained in *Marathon*. Bankruptcy judges were specifically authorized to hear *and* determine the vast majority of proceedings. *See Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 168 (1st Cir. 1987) ("Congress intended that 'core proceedings' would be interpreted broadly, close to or congruent with constitutional limits. The sponsors repeatedly said that 95% of the proceedings brought before bankruptcy judges would be core proceedings," *citing*, Statement of Rep. Kastenmeier, 130 Cong. Rec. E1108-E1110 (daily ed. March 20, 1984); Statement of Rep. Kindness, *Id.*, at H1848, H1850.).

Recognizing the state law nature of many bankruptcy questions, Congress specifically provided that, "(a) determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C. § 157 (b)(3).[7]

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[6] Initially, before the Bankruptcy Court, Ben Cooper argued that the adversary proceeding could be deemed "core" under four subsections of § 157(b)(2). The Bankruptcy Court ruled that the proceeding was core under 157(b)(2)(A) (administration) and 157(b)(2)(L) (confirmation of plans). The Second Circuit relied only on subsection (A).

[7] Petitioners apparently ignore this part of the statute. Clearly, noncore cases are not synonymous with state law claims.

To satisfy the constitutional mandate of *Marathon*, a core proceeding need not involve a "public" right.[8] Rather, it need only involve a claim which is not a *traditional* state common-law claim, *i.e.*, a claim which is either made subject to a federal rule of decision, or is more than peripherally related to a bankruptcy proceeding.

The broad nature of "core" jurisdiction is fully supported by the legislative history of BAFJA. As summarized by the First Circuit in *In re Arnold Print Works, Inc.*, *supra*, 815 F.2d at 168:

> [The Sponsors] used arguments strongly suggesting that they were pressing the notion to its constitutional bounds. They referred to the suits in the non-core category as "Marathon-type" cases, *see, e.g., id.* at E1108, E1109 (daily ed. March 20, 1984) (prepared statement of Representative Kastenmeier); *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness), which they understood to be proceedings of "a very limited kind," *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness). Representative Kastenmeier said that "jurisdiction in core bankruptcy proceedings is broader than the summary jurisdiction under pre-1978 law," 130 Cong.Rec. E1108 (daily ed. March 20, 1984), and summary jurisdiction covered post-petition claims.

See also In re Axona International Credit & Commerce Ltd., 115 Bankr. 442, 446 (S.D.N.Y. 1990) ("Bankruptcy judges should be granted as broad authority as constitutionally permissible

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[8] This conclusion follows from *Granfinanciera*, which teaches that a disputed core matter (*e.g.*, a fraudulent conveyance) was not properly adjudicated in a non-Article III bankruptcy court even though it was not deemed to involve a "public right." 109 S.Ct. 2782.

in order to allow them to serve as effective custodians of our Bankruptcy Code."); *Pollner v. Connecticut Bank and Trust Co., N.A. (In re Harbor Park Associates Limited Partnership)*, 112 Bankr. 555, 558 (S.D.N.Y. 1990); *Meininger v. Swasey (In re Sarasota Casual, Inc.)*, 90 Bankr. 496, 497 (Bankr. M.D. Fla. 1988).

In light of the broad and flexible configuration of core jurisdiction contained in BAFJA – which was Congress' response to the constitutional infirmities invalidated in *Marathon* – the soundness of the Second Circuit's holding below becomes clear.

D. *The Second Circuit's Line of Cleavage*

The Second Circuit, like the First Circuit in *Arnold Print Works*, recognized that a debtor operating under the bankruptcy law is an entity entirely distinct from its pre-petition embodiment. By commencing the bankruptcy case, the entity becomes a debtor, seeking and being given the protection of the bankruptcy court. *See* 11 U.S.C. § 301. Upon such filing, the bankruptcy estate is created. 11 U.S.C. § 541(a). This "line of cleavage", *see Goggin v. Division of Labor Law Enforcement*, 336 U.S. 118, 125-126 (1949), according to the Second Circuit, is what sets this case apart from *Marathon*, as well as other cases raising pre-petition claims.[9]

The "line of cleavage" having been drawn when Ben Cooper filed its Chapter 11 petition, the Second Circuit went on to

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[9] Contrary to petitioners' argument, this distinction *is* of importance and has been relied upon by numerous cases in distinguishing the pre-petition claim in *Marathon* from post-petition claims. *See, e.g., Edgcomb Metals Co. v. Eastmet Corp.*, 89 Bankr. 546, 553 (D.Md. 1988); *In re Sarasota Casual, Inc.*, 90 Bankr. 496, 498 (Bankr. M.D. Fla. 1988); *Rafoth v. National Union Fire Ins. Co. (In re Baker & Getty Financial Services, Inc.)*, 88 Bankr. 137, 139-40 (Bankr. N.D. Ohio 1988); *Burns v. Massachusetts Property Insurance Underwriting Assoc. (In re Mike Burns Inn, Inc.)*, 70 Bankr. 863, 867 (Bankr. D. Mass. 1987).

determine whether Ben Cooper's adversary proceeding, based on a post-petition insurance contract, fit within one of the enumerated core proceedings contained in § 157(b)(2). It found its provision in subsection (A) – "matters concerning administration of the estate."[10]

The Second Circuit reviewed the facts which set this case apart from *Marathon*. In holding that the adversary proceeding was core, the Second Circuit stated:

> the Georgia facility was an asset of the estate; Cooper's reorganization plan promised adequate insurance for the estate assets; the bankruptcy court's confirmation of the plan was premised on adequate insurance; and appellees were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. It is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration.

896 F.2d at 1399-1400 (citations omitted).[11] *See also In re Mike Burns Inn, Inc.*, 70 Bankr. 863 (Bankr. D. Mass. 1987) (adversary

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[10] Petitioners argue that since the list of core proceedings does not include insurance disputes, this fact alone leads to the conclusion that the dispute is not core. At best, this is a strained reading of the non-exhaustive list of core proceedings. Presumably, petitioners would have preferred that Congress had listed every conceivable type of core proceeding. This, Congress chose not to do. *See, e.g., In re Mankin*, 823 F.2d 1296, 1300-1301 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("Section 157(b)(2) does not set categorical limits on the jurisdiction of bankruptcy courts over core proceedings, but rather merely enumerates examples of proceedings falling within a bankruptcy court's core proceeding jurisdiction.").

[11] The Second Circuit distinguished two cases relied on by petitioners below and reiterated in their brief here. The Court distinguished *Piambo Corp. v. Castlerock Properties, Inc. (In re Castlerock Properties)*, 781 F.2d 159 (9th

(Footnote continued)

proceeding to recover on post-petition insurance contract was core under 157(b)(2)(A)); *Heaven Sent, Ltd. v. Centennial Insurance Co. (In re Heaven Sent, Ltd.)*, 50 Bankr. 636, 638 (Bankr. E.D. Pa. 1985) ("We hold that the question of preservation of insurance in a chapter 11 proceeding is directly related to the administration of the estate").

The post-petition distinction – together with all of its implications – is well-founded in the case law subsequent to *Marathon* and BAFJA. In *Arnold Print Works*, the First Circuit came to the conclusion later adopted by the Second Circuit. The underlying dispute in *Arnold* evolved from the sale of printing rollers, part of the liquidation of the debtor's assets.[12] The First Circuit found that the debtor's action to collect a post-petition contractual debt fell within the literal wording of § 157(b)(2)(A), "because it involves a claim that arose out of the administrative activities of a debtor-in-possession." *Id.*, 815 F.2d at 168.[13] *See also In re Baker & Getty Financial Services, Inc.*, 88 Bankr. 137, 140 (Bankr. N.D. Ohio 1988) ("We believe that the post-Petition insurance contract at issue here is analagous to the post-Petition contract considered in *Arnold*. As a result, we fully subscribe to the reasoning expressed by the *Arnold* court on this issue"); *In re Sarasota Casual, Inc.*, 90 Bankr. 496, 497-498 (Bankr. M.D. Fla. 1988) ("The vast majority of courts

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Cir. 1986), as apparently involving a pre-petition contract, and as reading the statutory scheme in a way that "would render the general provisions [of § 157(b)(2)] null." 896 F.2d at 1400. The Second Circuit also rejected the formulation of the Court in *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987), that a core proceeding must be one that, by its nature, could only exist in a bankruptcy case. Instead, the Second Circuit found that "the timing of a dispute may render it uniquely a bankruptcy case." 896 F.2d at 1400.

[12] In this regard, Ben Cooper's case is even stronger than that of the debtor in *Arnold*. The procurement of insurance was *required* of Ben Cooper. Thus, the contract at issue was integrally related to the debtor's reorganization efforts and the administration activities of the estate.

[13] Petitioners clearly misapply the literal wording of the statute. Disputes such as the one herein and in *Arnold* clearly arise *in* a case under title 11.

that have considered the status of similar post-petition claims have held that they were core proceedings . . . . A post petition contract made by a debtor-in-possession cannot be called a "Marathon" state contract action"); *In re Mike Burns Inn, Inc.*, 70 Bankr. 863, 867 (Bankr. D. Mass. 1987) ("the instant case is distinguishable from *Marathon* because the Debtors are suing . . . for *post-petition* breach of contract and deceit, matters clearly affecting this Court's administration of the Debtor's estates" [emphasis in original]); *L.A. Clarke and Son, Inc. v. Bullock Construction, Inc. (In re L.A. Clarke and Son, Inc.)*, 51 Bankr. 31, 33 (Bankr. D.C. 1985) ("All the operative events . . . occurred during the period after the Debtor's Chapter 11 petition was filed, while the Debtor was a Debtor-in-possession, and they all involved the activities of the Debtor as Debtor-in-possession, operating under the aegis of this Court's protection and authority.").

In distinguishing the case before it from *Marathon* and its Article III considerations, the First Circuit, in *Arnold Print Works*, determined that a debtor's post-petition claims were both historically and functionally different from the claims in *Marathon*. 815 F.2d at 169. Thus, post-petition claims are not the "traditional" state law contract claims required to be determined by Article III judges. Rather, such claims historically were adjudicated by bankruptcy courts since at least 1898. *Id.*, 815 F.2d at 169.

Furthermore, the First Circuit reasoned that a debtor-in-possession is, in effect, a creature of the bankruptcy court itself. Thus, one who contracts with a debtor-in-possession is, in effect, contracting with the bankruptcy court and subjecting itself to the bankruptcy court's jurisdiction. *Id.*, 815 F.2d at 170. *Accord, Woodard v. Sanders (In re SPI Communications & Marketing, Inc.)*, 112 Bankr. 507, 510 (Bankr. N.D.N.Y. 1990) ("the debtor-in-possession is, to an extent, viewed as an officer of the bankruptcy court [and] the contract is treated as a contract with the Court itself. The party entering into the contract thereby subjects himself to the bankruptcy court's jurisdiction"); *Edgcomb Metals Co. v. Eastmet Corp.*, 89 Bankr. 546, 550

(D.Md. 1988) ("This case asks whether an entity that chooses to contract with a debtor in its capacity as debtor-in-possession, knowing that the debtor is subject to the bankruptcy court's control, has consented to the bankruptcy court's [core] jurisdiction. The Court thinks it has.").[14]

One of the leading commentators on bankruptcy agrees that the "better result" is that proceedings involving post-petition claims are core proceedings since the cause of action "arises in" a title 11 case, and was not owned by the debtor at the time the case was commenced. L. King, *Collier on Bankruptcy*, 15th ed. ¶ 3.01 [iv] at 3-50 (1990). *See also Eastern Electric Sales Co., Inc. v. General Electric Co.*, 94 Bankr. 348, 349 (E.D. Pa. 1989) ("an action to recover on a debt which accrued after the bankruptcy petition was filed is core because it 'aris[es] in a case under title 11,' 28 U.S.C. § 157(b)(1); it was not already 'owned by the debtor' at the time the bankruptcy petition was filed").

* * *

When the Supreme Court in *Marathon* invalidated the jurisdiction of the bankruptcy courts, it held that it was constitutionally impermissible for Article I courts to finally resolve traditional state law claims. Congress responded with BAFJA, in which it satisfied the Court's concerns by permitting the Article I bankruptcy judges to hear and determine those "core" proceedings (including certain state law claims) which are inextricably related to the bankruptcy estate, while limiting their ability to finally determine traditional state law (i.e., related) proceedings.[15]

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[14] Petitioners' claim that it has been unwillingly swept into the "maze" of bankruptcy jurisdiction is disingenuous as petitioners willingly and knowingly entered into a contract with a debtor-in-possession.

[15] Respondent acknowledges this Court's concern expressed in *Marathon* that the final adjudication of "private rights" (as the "traditional state law" claims in *Marathon*) should be reserved for Article III courts while the final adjudication of "public rights" may be delegated to Article I courts. *Marathon*, 458

(Footnote continued)

The Second Circuit's determination that the adversary proceeding is core is fully consistent with these distinctions. Congress recognized that matters involving estate administration were "core" to the functions of the bankruptcy courts. Here, where the debtor, as part of its reorganization activities, was required to obtain insurance, and entered into an insurance contract with an entity which knew it was dealing with a debtor-in-possession, it is clear that such matters, as the Second Circuit stated, "are intrinsic to estate administration." Thus, this adversary proceeding is core under § 157(b)(2)(A) and the holding of the Second Circuit should be affirmed.

II

THE CONDUCT OF JURY TRIALS IN BANKRUPTCY COURT IS CONSISTENT WITH STATUTORY AND CONSTITUTIONAL AUTHORITY AND IS SUPPORTED BY POLICY CONSIDERATIONS

A. *Introduction*

In its most recent pronouncement on the issue of jury trials in bankruptcy proceedings — *Granfinanciera* — this Court expressly left open the second question which is raised in this appeal, namely, whether bankruptcy courts have the statutory and constitutional authority to conduct jury trials.[16] For sound

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U.S. at 71. Although the concept of "public rights" has been expanded (*see, Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. at 593-594), respondent acknowledges that the Court has not equated "public rights" with all "core" proceedings. *See Granfinanciera*, 109 S.Ct. at 2805 (White, J., dissenting). However, respondent agrees with the Second Circuit that such a leap is not necessary in reaching a determination that a contract knowingly entered into with a debtor-in-possession (and which is mandated by its plan of reorganization) is not the type of traditional state law "private" claim which requires adjudication by an Article III court.

[16] Petitioners obviously read *Granfinanciera* selectively. The Court's language in *Granfinanciera* can hardly be "dispositive" of this appeal since the Court expressly left open the jury trial issue. 109 S.Ct. at 2801.

reasons, both of a legal and policy nature, this Court should find that bankruptcy courts have such authority.

In *Granfinanciera*, the Court ruled that a party who has not filed a claim in a pending bankruptcy proceeding is entitled to a jury trial in an action seeking to set aside a fraudulent conveyance – notwithstanding Congress' inclusion of actions to set aside fraudulent conveyances in its non-exclusive list of core proceedings, 28 U.S.C. § 157(b)(2) (H). *Id.*, 109 S.Ct. at 2800. The gravaman of the Court's holding is that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or specialized court of equity." *Id.*, 109 S.Ct. at 2800.

That having been said, the Court deferred ruling on whether the bankruptcy court could conduct the jury trial:

> We do not decide today whether the current jury trial provision - 28 U.S.C. § 1411 (1982 ed., Supp. IV) - permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments.

Id., 109 S.Ct. at 2802.

Nevertheless, the Court expressly left the door ajar, if not open:

> (O)ne cannot easily say that "the jury would be incompatible" with bankruptcy proceedings, in view of Congress' express provision for jury trials in certain actions arising out of bankruptcy litigation. *See* 28 U.S.C. § 1411 (1982 ed., Supp. IV). And Justice WHITE's claim that juries may serve usefully as checks only on the decisions of judges who enjoy life

> tenure, see *post*, at 2812, overlooks the extent to which judges who are appointed for fixed terms may be beholden to Congress or executive officials, and thus ignores the potential for juries to exercise beneficial restraint on their decisions.

Id., 109 S.Ct. at 2801 (citations omitted).[17]

In deciding this issue, the Court must choose between the conflicting views of the Second Circuit in the case appealed from – which held that bankruptcy courts have both the statutory and constitutional authority to conduct jury trials – and of the Eighth and Tenth Circuits[18], which ruled that bankruptcy courts lacked the statutory authority to conduct jury trials.[19]

Ben Cooper submits that the position of the Second Circuit should be affirmed by this Court, not only for the sound reasons advanced by the Second Circuit, but because the conduct of jury trials in the bankruptcy courts is most consistent with the long-standing, well-settled and laudable purposes of Chapter 11 bankruptcy proceedings – to expeditiously and efficiently restore a debtor's financial health and reinstate the debtor as a productive member of society.[20]

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[17] Petitioners, in their "neutrality" argument, omit reference to the potential for juries to serve as checks on judges who do not enjoy life tenure, as explicitly recognized in *Granfinanciera*.

[18] *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990); *In re Kaiser Steel Corporation*, 911 F.2d 380 (10th Cir. 1990).

[19] Neither the *Missouri Bank* nor *Kaiser* decisions addressed the constitutionality of jury trials in bankruptcy courts, relying solely on their belief that bankruptcy courts lacked the statutory authority to conduct jury trials.

[20] As the Second Circuit noted, the majority of cases which have addressed the issue have found that jury trials may be conducted in core proceedings. *See*, Gibson, "Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment," 72 Minn. Law Rev. 967, 1027-1034 (1988) (hereinafter "*Gibson*"). *See also*, *In re Windmill Farms Management Co.*, 116

(Footnote continued)

B. *Statutory Authority to Conduct Jury Trials*

In analyzing the statutory basis for the conduct of jury trials in bankruptcy courts, the Second Circuit (despite the fact that this Court referred to it in *Granfinanciera*) found insufficient guidance in 28 U.S.C. § 1411 – the only statute presently in effect which explicitly addresses this issue. Instead, the Second Circuit looked to the jurisdictional grants contained in BAFJA, analyzing these sections in light of *Granfinanciera*.

Section 151 of Title 28, the general grant of jurisdiction, gives to bankruptcy judges "the authority conferred under this chapter with respect to any action, suit, or proceeding." 28 U.S.C. § 151. Section 157(b) grants bankruptcy judges the authority to "hear *and* determine all cases under title 11 and *all core proceedings* arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and *judgments*, subject to review under section 158 of this title." 28 U.S.C. § 157(b) (emphasis added).

In light of *Granfinanciera's* holding that the Seventh Amendment right to a jury trial may attach in certain core proceedings, the Second Circuit reasoned that the only way to reconcile the statutory scheme with *Granfinanciera* was to permit bankruptcy courts to hold jury trials. Any other interpretation would render the statutory scheme meaningless. As the Eighth Circuit recognized in *United Missouri Bank*, even though the authority to conduct jury trials may not be expressly provided, "that authority may still be implied if it is incidental and necessary to make the legislation effective." 901 F.2d at 1455, *citing*, 2A Sutherland Stat. Const. § 55.04 (1984); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941).

Bankr. 755, n. at 765 (Bankr. S.D. Cal. 1990) ("The controlling precedent in this district is that [bankruptcy courts] do have jury trial powers in core proceedings."); *Citibank, N.A. v. Park-Kenilworth Industries, Inc.*, 109 Bankr. 321, 328 (N.D. Ill. 1989) ("a clear majority of these courts have found that bankruptcy courts have the power to conduct jury trials in core proceedings" [citing cases therein]); *Walsh v. Long Beach Honda (In re Gaildeen Industries, Inc.)*, 59 Bankr. 402, 406 (N.D. Cal. 1986) ("the overwhelming majority of published decisions addressing the issue have concluded that bankruptcy courts do have the power to conduct jury trials." [citing cases therein]).

The Second Circuit's analysis, as well as the analysis undertaken by other courts and commentators, leads ineluctably to the conclusion that bankruptcy courts have the statutory authority to conduct jury trials.

1. *28 U.S.C. § 1411*

The only current section which explicitly addresses the question of jury trials in bankruptcy proceedings is 28 U.S.C. § 1411, one of the sections added by BAFJA. That section reads, in its entirety, as follows:

> § 1411. Jury Trials.
>
> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.
>
> (added Publ.L. 98-353, Title I, § 102(a), July 10, 1984, 98 Stat. 335.)

Section 1411 replaced a section of the former Bankruptcy Reform Act which was invalidated by *Marathon*. The predecessor to § 1411 was § 1480, which provided, in part, that "this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11 . . . ." Section 1480 was generally interpreted as expressing Congress' intent to allow bankruptcy judges to hold jury trials. *See, e.g., In re Gaildeen Industries, Inc.*, 59 Bankr. 402, 404 (N.D. Cal. 1986) (and authorities cited therein).

The enactment of § 1411, as part of BAFJA, has thus caused a great deal of uncertainty:

> Although there is some confusion over the effect § 1411 has on the right to a jury trial in bankruptcy court, as well as the fate of the broader provision contained in § 1480, courts have generally concluded that § 1411 was not intended to limit the power of bankruptcy judges to conduct jury trials in actions other than those for personal injury or wrongful death.

In re Gaildeen Industries, Inc., *supra*, 59 Bankr. at 405. *See also Morse Electric Company, Inc. v. Logicon, Inc. (In re Morse Electric Company, Inc.)*, 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985); *Lerblance v. Rodgers (In re Rodgers & Sons, Inc.)*, 48 Bankr. 683, 687 (Bankr. E.D. Okla. 1985).

To further confuse matters, "there is very little legislative history to tell us what Section 1411(a) was and was not intended to do." L. King, *Collier on Bankruptcy*, 15th ed., ¶ 3.01 [7][b][i] at 3-103 (1990). Indeed, virtually the only legislative statement on Congress' intent in enacting § 1411 is contained in the comments by Senator Dennis DeConcini, a member of the Senate-House Committee Conference, published subsequently in ABI Newsletter No. 3, at p. 3 (Winter 1984/1985):

> I believe there was no intent on the part of Congress to alter or modify the rights to jury trial that might have existed under the Reform Act . . . There was no desire on the part of the conferees to limit the right to jury trial in other areas.

See McCormick v. American Investors Management, Inc. (In re McCormick), 67 Bankr. 838, n. at 842 (D. Nev. 1986).[21]

At the very least, § 1411 establishes Congress' belief (as stated by the Court in *Granfinanciera*) that jury trials are not incompatible with bankruptcy proceedings.

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[21] Although the remarks of one Senator are generally insufficient to establish legislative intent, *see Weinberger v. Rossi*, 456 U.S. 25, 35 (1982), in the absence of any contrary statements in the legislative history, such comments are entitled to some weight. *See In re McCormick*, *supra*, 67 Bankr. at 842.

2. *The Jurisdictional Statutes*

The uncertainty engendered by § 1411 requires analysis of 28 U.S.C. § 157 – the primary statute revamping the jurisdiction of the bankruptcy courts following *Marathon*.

As stated previously, the Second Circuit placed primary reliance on § 157(b), which permits bankruptcy judges to hear *and* determine core proceedings, in finding statutory authority for jury trials in bankruptcy courts. Other courts have similarly relied on § 157. *See, e.g., Citibank, N.A. v. Park-Kenilworth Industries, Inc.*, 109 Bankr. 321, 328 (N.D. Ill. 1989) (§ 157(b)); *Daily v. First Peoples Bank of New Jersey*, 76 Bankr. 963, 967-68 (D. N.J. 1987) (§ 157(b)); *Data Compass Corp. v. Datafast, Inc. (In re Data Compass Corp.)*, 92 Bankr. 575, 582 (Bankr. E.D.N.Y. 1988) (§ 157(b)); *Macon Prestressed Concrete Co. v. Duke*, 46 Bankr. 727, 730 (M.D. Ga. 1985) (§ 157(a)). Indeed, as the Second Circuit acknowledged, the only way to reconcile the express statutory language with this Court's holding in *Granfinanciera* is to find that a bankruptcy court's authority to hear and determine core proceedings and to issue judgments therein must necessarily include the right to conduct a jury trial.[22] "The power to be implied . . . must be practically indispensible and essential in order to execute the power actually conferred." 2A Sutherland Stat. Const. § 55.03. Here, the power to conduct a jury trial *is* indispensible and essential in order for bankruptcy courts to "hear and determine" core proceedings.

As one of the leading bankruptcy commentators has stated:

> It is not an overly generous construction of section 157(a), however, to conclude that the authority given the district court to refer cases and proceedings "vests

[22] Admittedly, under the present statutory scheme, it would appear unlikely that a bankruptcy court could conduct a jury trial in a noncore or related proceeding, both because of the *de novo* review of bankruptcy court determinations in noncore matters, 28 U.S.C. § 157(c)(1), and because such review would violate the Seventh Amendment's re-examination clause. Petitioners' devotion of a substantial portion of their brief to this issue is inapposite.

> the bankruptcy court with the same authority to conduct a jury trial" as exists in the district court.

L. King, *Collier on Bankruptcy*, 15th ed., ¶ 3.01 [7][b][i] at 3-106 (1990), *quoting*, *Macon Prestressed Concrete Co. v. Duke*, *supra*, 47 Bankr. 727.

Indeed, as acknowledged by the Eighth Circuit in *United Missouri Bank*, implied authority for bankruptcy courts to conduct jury trials may be found in the limitations placed on the District Court's authority to conduct jury trials under § 157(b)(5) (requiring that jury trials on personal injury tort and wrongful death actions be conducted by the district court). This limitation has been relied upon by some courts in finding that jury trials of other matters *may* be held in bankruptcy courts. *See Perino v. Cohen (In re Cohen)*, 107 Bankr. 453, 455 (S.D.N.Y. 1989); *Wolfe v. First Federal Savings & Loan Association of Paragould (In re Wolfe)*, 68 Bankr. 80, 87-88 (Bankr. N.D. Tex. 1986).

The authorities – including the Eighth and Tenth Circuits – which rely on the lack of express statutory authority to conduct a jury trial in bankruptcy base such conclusions on a faulty assumption – that only an express statutory grant would permit the bankruptcy courts to conduct jury trials. The district courts themselves do not have express statutory authority to conduct jury trials. *See Gibson*, n. at 1027-1028; 28 U.S.C. § 1861, *et seq.*; 28 U.S.C. § 81, *et seq.* Rather, this authority is presumed by the grant of jurisdiction over matters at law. To require express and unequivocal statutory authority to conduct a jury trial in bankruptcy court and not require the same for district courts is, at best, inconsistent.[23]

Therefore, the Second Circuit's reliance on § 157 is well-founded.

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[23] Indeed, the *lack* of an express prohibition of jury trials in bankruptcy has led some courts to find the authority implicit to do so. *See, e.g., In re McCormick*, *supra*, 67 Bankr. at 841 ("It is clear that there is no express statutory provision prohibiting bankruptcy courts from conducting jury trials.").

3. *Congressional Intent*

Although express statutory authority may be lacking, it is appropriate to look to legislative history from which congressional intent on this issue may be gleaned. *See, Blum v. Stenson*, 465 U.S. 886, 896 (1984).

When *Marathon* invalidated the key provisions of the 1978 Act, the Judicial Conference promulgated emergency rules to be applied until the statutory scheme could be reworked. Among the emergency rules was a rule expressly prohibiting jury trials.[24] When Congress subsequently enacted BAFJA, it adopted the vast majority of the provisions contained in the emergency rules. However, Congress did not adopt the rule prohibiting jury trials in bankruptcy courts. Courts and commentators have taken this to be a clear indication that Congress intended that jury trials be a part of the new bankruptcy scheme. *See, e.g., Taxel v. Electronics Sports Research (In re Cinematronics, Inc.)*, 111 Bankr. 902, 905 (S.D. Cal. 1990); *Citibank, N.A. v. Park-Kenilworth Industries, Inc.*, 109 Bankr. 321, 328 (N.D. Ill. 1989); *In re McCormick, supra*, 67 Bankr. at 842; *Daily v. First Peoples Bank of New Jersey*, 76 Bankr. 963, 967 (D.N.J. 1987); *In re Gaildeen Industries, supra*, 59 Bankr. at 406; *Gibson*, n. at 1031-1032.[25]

Further legislative intent can be found in Congress' enactment of § 157(b) itself. As the Second Circuit found, the ability granted to bankruptcy judges to "hear *and* determine" core proceedings evinces congressional intent that bankruptcy judges may conduct jury trials. *See also In re Gaildeen Industries, Inc., supra*, 59 Bankr. at 406.

This much is clear: when Congress enacted BAFJA, it intended to build upon the expanded scope of bankruptcy jurisdiction envisioned by the 1978 Act subject, of course, to *Marathon's*

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[24] Subsection (d)(1) of the emergency rules provided that "the bankruptcy judges may not conduct . . . jury trials." *See Gibson*, n. at 988.

[25] Petitioners cannot have it both ways. They cannot rely on the emergency rules' prohibition of jury trials, yet ignore that Congress chose not to enact that portion of the rules.

limitations.[26] *See, e.g., Huffman v. Perkinson (In re Harbour)*, 840 F.2d 1165, 1178 (4th Cir. 1988) ("as we have previously noted, Congress took an expansive approach to jury trials in the 1978 Act."). As noted previously, Congress intended that a bankruptcy court's core jurisdiction be close to or congruent with permissible constitutional limits. *See In re Arnold Print Works, supra*, 815 F.2d. at 168. It would be wholly inconsistent with this congressional intent if a significant percentage of core cases were removed from bankruptcy court jurisdiction because of a party's entitlement to a jury trial.

C. *Constitutional Authority to Conduct Jury Trials*

After determining that there existed a sufficient statutory basis for a bankruptcy court to conduct a jury trial, the Second Circuit turned to an analysis of the Constitution. The Second Circuit found no impediment in the Seventh Amendment, at least as to core proceedings, since the statutes did not require *de novo* review of determination in core proceedings. 896 F.2d at 1403. As for Article III, the Second Circuit reasoned that since bankruptcy courts have the constitutional power to enter final judgments without violating Article III, it must necessarily follow that jury trials do not conflict with the requirements of Article III. 896 F.2d at 1403-1404.

The Second Circuit's constitutional analysis is sound and should be adopted in affirming its decision below.[27]

1. *The Seventh Amendment*

There appears little doubt that, after *Granfinanciera*, Congress cannot abridge a litigant's Seventh Amendment rights by

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[26] "A major impetus underlying [the 1978 Act] has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . ." S.Rep. No. 95-989, 95th Cong., 2nd Sess., 17 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5587, 5803, as quoted in *In re Data Compass Corp., supra*, 92 Bankr., n. at 579.

[27] Since neither the Eighth Circuit in *In re Missouri Bank, N.A.* nor the Tenth Circuit in *In re Kaiser Steel Corp.* reached the constitutional issues, there is no other Circuit level authority taking issue with the Second Circuit's approach.

relabeling as a "core" matter one in which a litigant would otherwise be entitled to a jury trial. 109 S.Ct. at 2800. However, this does not make a jury trial in bankruptcy court inconsistent with the Seventh Amendment, at least with respect to a core proceeding.

A jury trial in bankruptcy court is clearly consistent with the essential attributes of a Seventh Amendment jury trial. This Court has expressly sanctioned Seventh Amendment jury trials in non-Article III courts – specifically the District of Columbia Courts. *See Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974). *See also Gibson*, at 1036-1037 ("The District of Columbia courts illustrate most persuasively that the seventh amendment does not require that only article III judges preside over jury trials."). There is no question that bankruptcy judges have the competence to perform the functions required of judges under the Seventh Amendment. *See In re McCormick*, *supra*, 67 Bankr. at 842 ("This is especially true because a judge's duty in a jury trial is not significantly different from the traditional functions of a bankruptcy judge."). *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), does not mandate a different conclusion, as it teaches merely that a jury must be ". . . under the superintendence of a judge empowered to instruct them on the law and on the facts . . . ." 174 U.S. at 13-14.

In addition, jury trials in core bankruptcy proceedings do not violate the re-examination clause of the Seventh Amendment.[28] Since a bankruptcy court's findings in a core proceeding are subject only to ordinary appellate review (28 U.S.C. § 158), there is no such impediment here. *See, e.g., Luper v. Langley (In re Lee Way Holding Co.)*, 115 Bankr. 586, 591 (S.D. Ohio 1990) ("Hence, the Court of Appeals [in *Ben Cooper*] determined that the review of the jury verdict under traditional standards of appellate review does not violate the Seventh Amendment . . . . This Court embraces the rationale articulated by the Second Circuit").

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[28] As conceded earlier, and as stated by the Second Circuit below, jury trials in noncore or related proceedings would pose Seventh Amendment problems.

The Second Circuit is correct: there is no impediment to a bankruptcy court's conduct of a jury trial in the Seventh Amendment.

2. *Article III*

As the Second Circuit noted, there is one additional constitutional hurdle to the conduct of a jury trial in bankruptcy courts — the reservation of the "judicial power" to Article III courts.

One of the acknowledged purposes of Article III — to preserve the independence of the federal judiciary — is not compromised by a jury trial in bankruptcy court. In fact, a jury may "exercise beneficial restraint" on the decisions of a non-Article III judge. *See Granfinanciera*, 109 S.Ct. at 2801; *In re Lee Way Holding Co.*, *supra*, 115 Bankr. at 591 ("This Court is in full agreement [with the Second Circuit in *Ben Cooper*] that jurors are even less likely to feel pressure from the legislative or executive branches of government than judges, particularly bankruptcy judges who do not enjoy lifetime tenure."). *See also Gibson*, at 1042-1043 ("The potential for domination of the federal judiciary [by the other branches], however, is greater in the case of a bench trial, when the judge is the fact finder, than in the case of a jury trial.").

The restriction of jury trials to Article III courts is not mandated by *Marathon*. While the Court in *Marathon* referred to the power to conduct a jury trial as an example of one of the impermissible delegations to Article I courts, it held solely that it was the aggregate of these delegated powers which constituted this impermissible delegation. *Marathon* did *not* hold that bankruptcy courts cannot constitutionally conduct a jury trial.[29] *See, e.g., Daily v. First Peoples Bank of New Jersey*, *supra*, 76 Bankr. at 967 ("*Marathon* found unconstitutional the grant to bankruptcy courts of 'most, if not all, of the essential attributes of the judicial power,' but did not specifically void the power to hear cases tried by jury"); *M&E Contractors, Inc. v. Kugler-Morris General Contractors, Inc.*, 67 Bankr. 260, 266 (N.D.

[29] Indeed, petitioners concede that *Marathon* did not go so far. *Granfinanciera* has expressly left open this question.

Tex. 1986) ("[Justice Brennan] did not state, explicitly or implicitly, that only Article III courts may preside over jury trials"); *In re Gaildeen Industries, Inc., supra*, 59 Bankr. at 407 ("The Court did not hold that allowing bankruptcy courts to conduct jury trials would, in and of itself, constitute an unwarranted encroachment upon the judicial power of the United States.").

Further support for *Marathon's* limited holding can be found in the Court's adoption of since-repealed Bankruptcy Rule 9015:

> One year after its decision in *Northern Pipeline*, the Supreme Court adopted the since repealed Bankruptcy Rule 9015, which allowed jury trials in bankruptcy court. *Walsh v. Long Beach Honda (In re Gaildeen Industries)*, 59 B.R. 402, 407 (N.D. Cal. 1986). "Surely had the Court meant to preclude bankruptcy judges from conducting jury trials, it would not have adopted the Rule." *Id.* True, Rule 9015 has been repealed, but the advisory note commenting on its repeal left open the question of whether or not bankruptcy courts may conduct jury trials.

In re Cinematronics, Inc., supra, 111 Bankr. at 906. *See also In re McCormick, supra* 67 Bankr., n. at 840 ("(o)ther courts have concluded that the Supreme Court did not hold that jury trials in the bankruptcy courts are unconstitutional because, after *Marathon*, the Court promulgated the new Bankruptcy Rules of Procedure."); *Hassett v. Weissman (In re O.P.M. Leasing Services, Inc.)*, 48 Bankr. 824, n. at 827 (S.D.N.Y. 1985) ("the Supreme Court provided for jury trials under Bankruptcy Rule 9015 in 1983 . . . . and this Court declines to find that the Supreme Court would promulgate meaningless rules").[30]

Indeed, as stated above, jury trials are conducted by other non-Article III judges and this authority has been upheld by this Court. *See, e.g., Pernell v. Southall Realty*, 416 U.S. 363 (1974) (District of Columbia judges).

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[30] Although Rule 9015 was subsequently repealed, the Advisory Committee note indicated that a local rule could be adopted to govern jury trials. *See, In re Heartland Chemicals, Inc.*, 103 Bankr. 1018, 1021 (Bankr. C.D. Ill. 1989).

Moreover, the U.S. Magistrates Act also permits non-article III federal magistrates to conduct jury trials, at least where both parties have consented. 28 U.S.C. § 636(c)(1). The constitutionality of such authority has been expressly upheld. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 1158 (1985).

This Court has never held that non-Article III courts may not conduct jury trials. The conduct of jury trials in such courts does not run counter to the purposes of Article III. The holding of the Second Circuit should be affirmed.

D. *Policy Considerations*

The conduct of jury trials within bankruptcy proceedings is appropriate for sound policy reasons and is consistent with the primary goals of the federal bankruptcy system. Removing proceedings involving jury trials from the bankruptcy courts would not only emasculate the bankruptcy courts themselves but would overwhelm an already overcrowded district court jury docket.[31]

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[31] Another argument could be advanced which is consistent with the policy goals of the bankruptcy system: that petitioners, by knowingly contracting with a debtor-in-possession, have consented to the summary jurisdiction of the bankruptcy court and, as a result, have effectively waived their right to a jury trial. *See, e.g., In re Arnold Print Works, supra*, 815 F.2d at 170 ("Parties who contract with a bankrupt company's trustee or with a debtor-in-possession know that they are dealing with an agent responsible to a bankruptcy court; that the bankruptcy court would resolve subsequent disputes should therefore come as no surprise".); *Edgcomb Metals Co. v. Eastmet Corp., supra*, 89 Bankr. 546, 550 ("This case asks whether an entity that chooses to contract with a debtor corporation in its capacity as debtor-in-possession, knowing that the debtor is subject to the bankruptcy court's control, has consented to the bankruptcy court's jurisdiction. The Court thinks it has."); *In re Vincent*, 68 Bankr. 865, 867 (Bankr. M.D. Tenn. 1987) ("Those who deal with the debtor in its capacity as the debtor-in-possession have implicitly consented to have their claims tried by the bankruptcy court, for all of the reasons that the bankruptcy system was implemented, e.g., speedy resolution of disputes

(Footnote continued)

1. *A Jury Trial is Consistent with Congress' Interest in Determining All Bankruptcy Matters In One Proceeding*

One of the primary goals of the 1978 Act and of BAFJA was the resolution of all bankruptcy matters in the context of one proceeding. *See, e.g., Gibson*, n. at 1027 ("Indeed, the consolidation of bankruptcy litigation in the bankruptcy court was one of the goals underlying Congress' enactment of the 1978 Act."); *Eastern Air Lines, Inc. v. International Association of Machines & Aerospace Workers (In re Ionesphere Clubs, Inc.)*, 108 Bankr. 951, 955 (Bankr. S.D.N.Y. 1989) ("The bankruptcy court must also look to Congressional intent to broaden the jurisdictional scope of bankruptcy proceedings in order to bring into one forum all matters related to the bankruptcy case so as to facilitate the prompt administration of the bankruptcy proceedings"). Since the enactment of BAFJA, "the manifest direction of the law has been toward the gradual expansion of the authority wielded by the bankruptcy courts." *In re Lee Way Holding Co., supra*, 115 Bankr. at 591.

Indeed, one of the cornerstones of bankruptcy jurisprudence is the bankruptcy court's ability to use its expertise in the specialized bankruptcy area to handle all aspects of a debtor's rehabilitation. This ability would be severly hampered, if not destroyed, by removing discrete parts of a bankruptcy case to the district courts because of the requirement of a jury trial.

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and administration of the estate with a view to fairness for all creditors."); *In re Alan Wood Steel Co.*, 1 Bankr. 167, 168 (Bankr. E.D. Pa. 1979) ("The courts have therefore adopted an extreme position with respect to this and have ruled that a party contracting with an officer of the court in fact contracts with the court itself, and by such act subjects himself for the purposes of the contract to the summary jurisdiction of the court . . . .").

Nor is this argument inconsistent with this Court's holding in *Granfinanciera*. A fraudulent conveyance claim may indeed have, as its historical basis, the determination of legal rights. Here, however, parties have *willingly* and *knowingly* contracted with a debtor-in-possession. It is readily apparent that the "consent" present in this situation is not present in the fraudulent conveyance context.

See, e.g., In re Data Compass Corp., supra, 92 Bankr. at 582 ("to hold that jury trials must be held in a forum other than the Bankruptcy Court is counter to the intent of Congress in establishing a centralized forum for the speedy and efficient resolution of cases essential to the administration of a case under the Bankruptcy Code."); *In re McCormick, supra*, 67 Bankr. at 843 ("Most importantly, bifurcating jury trials from other matters before the bankruptcy court would cause complex procedural questions and needless delay."); *Nashville City Bank & Trust Co. v. Armstrong (In re River Tranportation Co.)*, 35 Bankr. 556, 560 (Bankr. M.D. Tenn. 1983) ("Procedural entanglements such as these will not only obstruct and hinder the administration of the bankruptcy estate but also tempt parties to use a jury trial request as a delaying device.").

In addition, permitting a bankruptcy court to conduct a jury trial would not significantly delay the resolution of a bankruptcy case. *See Pernell v. Southhall Realty, supra*, 416 U.S. at 384. A jury trial conducted in the district court would be no more expeditious than one conducted in the bankruptcy court. The bankruptcy court, which would be more familiar with the specific issues involved in core proceedings, could conduct a more efficient jury trial. *See, e.g., In re Axona International Credit & Commerce Ltd.*, 115 Bankr. 442, 446 (S.D.N.Y. 1990) ("Because of bankruptcy judges' specialized experience and expertise, granting them such [broad constitutional] authority will best assure the economical and expeditious management of bankruptcy estates."); *In re SPI Communications & Marketing, Inc.*, 112 Bankr. 507, 512 (Bankr. N.D.N.Y. 1990) ("It defies logic that a court less acquainted with bankruptcy law will better address issues of alleged malpractice in a bankruptcy context than a bankruptcy court").

Thus, from a policy point of view, it is appropriate that *all* aspects of a bankruptcy case be heard in the bankruptcy court.

2. *Removal of Jury Trial Cases Would Add to the Backlog in the District Courts and would Delay Resolution of Bankruptcy Proceedings*

In the wake of *Granfinanciera*, it appears that a significant percentage of proceedings which come under the core jurisdiction of the bankruptcy courts may entitle litigants to trial by jury. For example, under *Granfinanciera*, core proceedings to determine, avoid or recover fraudulent conveyances could give rise to a jury trial. Under the Second Circuit's formulation, matters concerning administration of the estate, a broad category, may involve a jury trial right. Proceedings to determine, avoid or recover preferences may also require a jury trial. *See In re Gaildeen Industries, Inc., supra*, 59 Bankr. at 403; *In re O.P.M. Leasing Services, Inc., supra*, 48 Bankr. at 824. It is conceivable that other core proceedings could involve matters as to which the litigants retain their Seventh Amendment rights.

Jury trials of these proceedings in the district courts would contribute to the already backlogged district court docket. The recent Report of the Federal Courts Study Committee emphasizes the severity of the problem:

> The deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog. It appears that the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us.

Report of the Federal Courts Study Committee, April 2, 1990, p. 6 ("Report"). As stated in the Report, "(o)ne method of alleviating the problems of these [Article III] courts, therefore, is by devolution of significant areas of federal judicial business to Article I courts and to administrative agencies, with limited

review by generalist Article III courts." Report, p. 17. *See also, Gibson*, n. at 1027 ("Thus, if a bankruptcy matter is to be tried to a jury, it would appear to be preferable to allow the bankruptcy judge to conduct the trial, rather than to require this litigation to be split off from all related bankruptcy matters and added to the district court's jury trial backlog."); *M&E Contractors, Inc. v. Kugler-Morris General Contractors, Inc., supra*, 67 Bankr. at 267 ("Neither would a wholesale diversion of jury trials to district courts alleviate delays, considering the state of the typical federal district court docket.").

Removal of jury trial cases to the district courts would thus lead to inexorable delays in the final resolution of bankruptcy matters, which is anathema to the primary goals of the federal bankruptcy system, and would contribute to the "long-expected crisis of the federal courts."

CONCLUSION

The decision of the Second Circuit, while cognizant of the limitations on bankruptcy courts imposed by *Marathon* and *Granfinanciera*, nevertheless seeks to balance these limits with the overall goals of the bankruptcy system. In holding that Ben Cooper's adversary proceeding is a core proceeding, and that the bankruptcy court may conduct a jury trial, the Second Circuit achieved that balance — its decision should be upheld by this Court.

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

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